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October 20, 2010

VIA ECF

Hon. James Gwin  
United States District Judge  
Carl B. Stokes United States Court House  
801 West Superior Avenue  
Cleveland, Ohio 44113-1838

Re: Serin v. Northern Leasing, S.D.N.Y. (No. 7:06-CV-01625)

Dear Judge Gwin:

Plaintiffs are compelled, yet again, to seek Your Honor's intervention under Rule 37, Fed. R. Civ. P. At 5:30 p.m., yesterday October 19, 2010 - about three weeks before the November 15<sup>th</sup> trial - Defendants served us a purported report by a hitherto undisclosed expert, Christopher Erath. "Ex. 1," Expert Report. Dr. Erath was not even identified by Defendants in their trial witness list, which Your Honor had ordered to be exchanged by October 5, 2010.

As Your Honor is well aware, expert reports are due 90 days before trial under the Federal Rules. Rule 26, Fed. R. Civ. P. In July 2010, Defendants had sought an extension to produce a handwriting expert's report. Plaintiffs did not oppose that request, and by order of July 7, 2010, Your Honor permitted them to serve that report by July 9, 2010. Dkt. 81. Defendants never made any mention of any other expert at that time.

Indeed, Defendants never disclosed Dr. Erath until now. Even in their highly belated Supplementary Disclosures of October 5, 2010, Dkt. 111-1, where Defendants sought to import five managerial employees as trial witnesses, they did not identify Dr. Erath either as a witness or as a trial witness. The first time Plaintiffs came to know of Dr. Erath was yesterday, October 19, when Defendants served a copy of his report. The expert reports by Dr. Smith concerning Plaintiffs were served over two months ago, the first one on July 15, 2010.

Equally objectionable, Defendants have not produced the requisite information for expert reports mandated by Rule 26. They have not produced the "data or information considered," "any exhibits that will be used to summarize or support them," or indeed, any documents allegedly

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reviewed by Dr. Erath. While Defendants have annexed a list of cases to his report, that list does not contain even elementary information such as case number or jurisdiction, and it is unclear whether the list covers the “previous 4 years” mandated by Rule 26.

Defendants’ last-minute submission of this expert report is severely prejudicial to Plaintiffs. First, Defendants were required to submit this by August 15, 2010. They did not, and did not even bother seeking Your Honor’s leave for serving a belated report. Second, Your Honor’s order of September 28, 2010, clearly required:

A. The parties shall file witness lists by Tuesday, October 5, 2010.

Dkt. 102. Defendants never filed any list of trial witnesses with the Court, and failed to comply with this order. While they did send an email to us, even that list did not contain Dr. Erath’s name.

Third, the very language of Rule 26 required that Defendants provide all the supporting documentation. Defendants did not provide that documentation.

It is less than a month before trial, and Plaintiffs are effectively prevented from analyzing this Report carefully, from submitting additional discovery requests or serving subpoenas (as Defendants have done) concerning Dr. Erath or this report, from taking Dr. Erath’s deposition, and consequently, from filing a *Daubert* motion. Accordingly, Plaintiffs request that an order be entered precluding Defendants from presenting Dr. Erath as a trial witness, or relying upon this report in any manner in this litigation.

Yours very truly,

Sd/-

Krishnan S. Chittur, Esq.  
Attorney for Plaintiffs

cc: Moses & Singer LLP (by ecf)